79-2016

Supreme Court, U.S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term
1979

IN RE: SEBASTIAN INTERSIMONE

PETITION FOR WRIT OF MANDAMUS, OR
WRIT OF PROHIBITION IN THE ALTERNATIVE

to the United States District Court for
the Southern District of New York
(Owen, R.J., District Judge)

James G. Kolb, Esquire
Attorney for Petitioner
414 Hungerford Drive
Rockville, Md. 20850
301-340-6850

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In Re Sebastian Intersimone

Motion for Leave to File Petition For Writ of Mandamus

Petitioner moves for leave to file Petition for Writ of Mandamus, and says as follows:

1. Application for counsel to represent petitioner in the United States District Court for the Southern District of New York has been denied by that Court.

2. Extraordinary relief has been petitioned from the United States Court of Appeals for the Second Circuit, but that Court has also denied Petition.

3. Consideration by this Court is necessary to require a Constitutionally

mandated duty to be performed, i.e. the provision of counsel in a critical stage of a criminal proceeding.

JAMES G. KOLB
Attorney for
Petitioner
414 Hungerford Dr.,
Suite 350
Rockville, MD 20850
340-6850

Question Presented

Should a writ of mandamus or writ of prohibition issue against a United States District Judge to require him to permit a defendant filing a Motion for New Trial to be represented by counsel of his choice, pro hac vice, or in the alternative should the District Judge be prohibited from acting to deny defendant's motion when he is not represented by counsel?

Person Against Whom Relief is Sought

Honorable Richard J. Owen, United States District Court for the Southern District of New York. Relief has been sought and denied in the United States Court of Appeals for the Second Circuit.

Order Issued Below

Attached as Exhibit A is copy of Motion and Affidavit filed in the United States District Court for the Southern

District of New York on March 20, 1980, with memorandum denial endorsed by the District Judge in the margin thereof on April 16, 1980.

Attached as Exhibit B is letter from petitioner's counsel dated April 21, 1980 with memorandum denial endorsed by the District Judge on April 24, 1980.

Attached as Exhibit C is Petition for Writs of Mandamus and Prohibition filed in the United States Court of Appeals for the Second Circuit on June 3, 1980, together with order of denial filed June 9, 1980, Docket Number 80-3023.

Statutory Provision Conferring Jurisdiction

This Court is authorized to exercise jurisdiction in this matter by 28 U.S.C. §1651 (a).

Constitutional Provisions Involved

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

> the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

Petitioner, Sebastian Intersimone, was convicted of narcotics-related offenses in the United States District Court for the Southern District of New York, Honorable Richard J. Owen, after a lengthy trial in summer and fall, 1976. He is presently serving a sentence of incarceration for 15 years in the United States Penitentiary, Lewisburg, Pennsylvania.

During the course of the trial, one of the jurors in the case approached petitioner's sister in an apparent attempt to solicit a bribe. This juror was re-

moved and replaced by an alternate. At the time of the juror's contact with petitioner's sister, the juror was accompanied by another juror who was not removed from the jury. The existence of this second juror and his identification as such have been the subject of litigation by one of petitioner's co-defendants in that individual's motion for new trial. Petitioner was not allowed to participate in his co-defendant's motion; his request to do so was denied by District Judge Richard J. Owen and this denial was affirmed by the United States Court of Appeals for the Second Circuit in March, 1980. It has been conceded by the government and stated by a panel judge at oral argument that petitioner, Sebastian Intersimone, would yet be entitled to a de novo hearing, presumably provided that Intersimone had new and different

facts to present to the District Court than had been presented by his co-defendant.

Intersimone had been represented by several different attorneys during the course of these proceedings. His efforts to establish that the jury which convicted him was in fact tainted were thwarted by an order by the District Judge prohibiting his contact with any of the jurors. Petitioner's attempts at discovery resulted in his further conviction for contempt and he was sentenced to an additional consecutive period of incarceration. Thereafter, in summer, 1979, petitioner employed present counsel to represent him in all matters. Present counsel had assisted in preparation of petitioner's direct appeal from his conviction and is familiar with the voluminous trial transcript and the many post conviction proceedings

which have occurred in this case. Petitioner has stated repeatedly that he desires present counsel to represent him.

Present counsel applied to represent petitioner pro hac vice in the United States District Court for the Southern District of New York, but this representation was denied. Petitioner is now left without counsel at this most critical stage of the proceedings. The District Judge acted in an arbitrary and capricious manner and abused his discretion in not permitting present counsel to appear pro hac vice to represent the petitioner in the District Court.

WHEREFORE, petitioner prays that a Writ of Mandamus issue to United States District Judge Richard J. Owen ordering his performance of the mandatory duty under the Sixth Amendment to the Constitution of the United States to permit

petitioner to be represented by counsel of his choice, and that present counsel be permitted to appear pro hac vice on behalf of petitioner; or in the alternative that a Writ of Prohibition issue prohibiting the United States District Judge Richard J. Owen from denying petitioner's Motion for New Trial while he is not represented by counsel.

James G. Kolb, Esq.
Attorney for Petitioner
414 Hungerford Dr.
Rockville, Md. 20850
301-340-6850

PROOF OF SERVICE

I certify that copies of the foregoing were deposited in a United States Mail Box, with first-class postage prepaid, addressed to Honorable R.J. Owen, United States District Court for the Southern District of New York, Foley

Square, New York, N.Y. 10007; Clerk, United States Court of Appeals, United States Court House, Foley Square, New York, N.Y. 10007; U.S. Attorneys Office, Southern District of New York, One St. Andrews Plaza, New York, N.Y. 10007; and the Solicitor General, Department of Justice, Washington, D.C. 20530 on June ____, 1980.

James G. Kolb, Esq.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term
1979

IN RE: SEBASTIAN INTERSIMONE

APPENDIX TO PETITION FOR WRIT OF MANDAMUS, OR WRIT OF PROHIBITION IN THE ALTERNATIVE

to the United States District Court for
the Southern District of New York
(Owen, R.J., District Judge)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES	:	
v.	:	76Cr324 (R.J.O.)
SEBASTIAN INTERSIMONE		
Defendant	:	MOTION AND AFFIDAVIT

1. Affiant moves that his appearance for the defendant be entered in this case pro hac vice for the purpose of Rule 33 motions for new trial, and states under penalties for perjury that the following information is true and correct:

a. Defendant has retained affiant as counsel for the filing and prosecution of Rule 33 motions for new trial.

b. Affiant is a graduate of the University of Maryland School of Law and is licensed to practice in Maryland and the District of Columbia. In addition, affiant has been admitted to practice before the United States District Courts for the District of Maryland and the District of Columbia, the United States Courts of Appeal for the 4th Circuit and the D.C. Circuit, the United States Court of Military Appeals, the United States Supreme Court, and is currently prosecuting two appeals pro hac vice in the United States Court of Appeals for the 2d Circuit.

EXHIBIT A

c. Affiant is in good standing in all the courts to which admitted, has never been disciplined, nor is disciplinary action pending, and affiant has read and understands the Federal Rules of Civil and Criminal procedure.

2. Motion is made on these presents.

/s/
JAMES G. KOLB, Esq.
Attorney for
Intersimone

A copy of this Motion and affidavit was mailed to the U.S. Attorney for the Southern District of New York on March 15, 1980.

/s/
JAMES G. KOLB

MEMORANDUM

These papers consisting of merely an attorney's affidavit place nothing before me upon which the court must act. The motion is therefore denied on its face. So ordered.

/s/
R.J. Owen
USDJ
4/16/80

James G. Kolb
Attorney at Law

* * *

April 21, 1980

Honorable Richard J. Owen

* * *

Re: Sebastian
Intersimone
76 Crim 324

Dear Judge Owen:

* * *

The Sixth Amendment to the Constitution guarantees defendants in criminal cases the effective assistance of counsel. Ferrara v. U.S., [sic] in its teaching that a defendant is the master of his own defense, implicitly leaves the matter of selection of counsel to the defendant. Sebastian Intersimone has chosen me as his attorney because it is his opinion that I am honest and he trusts me to look after his interests. He has a Constitutional right to his choice.

I am qualified to represent Sebastian Intersimone in the United States District Court for the Southern District of New York. It is my understanding, after inquiry, that attorneys from other jurisdictions are routinely permitted to appear pro hac vice in the Southern District.

EXHIBIT B

If I am Intersimone's choice and qualified to represent him, there must be some reason outside the pleadings that has triggered your negative action. Could it be that the totality of circumstances and the quantity of motions in this case have caused you to act on personal grounds? Could the contempt proceedings and possibility of other contempt proceedings have swayed you to prejudice the motion? Do you believe that Intersimone's employment of me as his attorney is simply another ploy?

* * *

Sincerely,

/s/
James G. Kolb

JGK/ssc

MEMORANDUM

Treating this as an application for reargument it is denied. So ordered.

/s/
R.J. Owen
USDJ
4/24/80

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re Sebastian Intersimone

Petitioner Docket No. 80-3023

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

Petitioner seeks writs of mandamus or prohibition directed to Honorable Richard J. Owen, United States District Court, Southern District of New York, and for his part says as follows:

1. Petitioner has pending before Judge Owen two motions for new trial filed pursuant to Rule 33, F.R.Cr.P. Motions and supporting documentation were filed by petitioner's attorney, James G. Kolb, Esq., together with an application for admission to the United States District Court for the Southern District of New York pro hac vice.

2. The said James G. Kolb, Esq., is thoroughly familiar with Intersimone's case, and with the factual and legal arguments Intersimone wants to raise to support his motions. The said attorney is a member in good standing of the courts of Maryland and D.C., the federal District Courts in those states, two U.S. Courts of Appeals, the U.S. Court of Military Appeals, and the U.S. Supreme Court. The attorney has never

EXHIBIT C

been disciplined by any court nor are disciplinary proceedings pending against him.

3. Petitioner was unable to find an attorney with whose representation he was satisfied other than the said James G. Kolb.

4. Judge Owen denied James G. Kolb's application to appear pro hac vice and left the petitioner unrepresented in the proceedings in the Southern District.

5. Petitioner asserts that it was an abuse of Judge Owen's discretion to deny him counsel. The application was denied although unopposed by the United States attorney.

6. Under the circumstances of this case, petitioner believes he is constitutionally entitled to counsel of his choice, and that the arbitrary and capricious action of Judge Owen has been a serious deprivation of this valuable right.

7. Petitioner also asserts that due to the nature of the litigation and the voluminous court record involved, that he would be severely damaged if he had to find another attorney who might be acceptable to Judge Owen. It would take some extended period of time for another attorney to become familiar with the case; time which the petitioner does not have because of his present state of incarceration.

8. Petitioner seeks an order directing Judge Owen to accept the application of James G. Kolb, Esq., as counsel for Sebastian Intersimone, in the proceedings in the United States District Court for the Southern District of New York.

9. Petitioner further seeks an order prohibiting Judge Owen from making a final determination on petitioner's motions for new trial until petitioner is properly represented by counsel and has an opportunity to participate fully in the proceedings.

10. Petitioner is presently incarcerated in the federal penitentiary at Lewisburg, Pa., and is unable to effectively represent himself pro se or to shop for an attorney.

11. The Court has authority to issue these writs under 28 USC §1651.

/s/

JAMES G. KOLB, Esq.
Attorney for
Petitioner
414 Hungerford Dr.
Rockville, Md. 20850
301-340-6850

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE: SEBASTIAN INTERSIMONE 80-3023

A petition for a writ of mandamus together with a motion for a stay having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/
Hon. Henry J. Friendly

/s/
Hon. Walter R. Mansfield
Circuit Judge

/s/
Hon. William O. Mehrtens
District Judge

Filed June 9, 1980

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-2016

IN THE
SUPREME COURT OF THE UNITED STATES

October Term
1979

IN RE: SEBASTIAN INTERSIMONE

SUPPLEMENT TO
PETITION FOR WRIT OF MANDAMUS, OR
WRIT OF PROHIBITION IN THE ALTERNATIVE

to the United States District Court for
the Southern District of New York
(Owen, R.J., District Judge)

James G. Kolb, Esquire
Attorney for Petitioner
414 Hungerford Drive
Rockville, Maryland 20850
301-340-6850

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Supplement to Petition 1

Exhibit D - Order of U.S.C.A.,
Second Circuit of
August 19, 1980 denying
pro se Petition. Apx-9

Supplement to Petition

Petitioner in this case filed a pro se Petition for the same relief requested by counsel for Petitioner at Exhibit C to the Petition filed in this case.

At Exhibit D is the action of the United States Court of Appeals denying that pro se Petition but indicating that one of the Circuit Judges would permit renewal in 60 days after the District Court had either held a hearing or developed the record further.

In addition, pursuant to Supreme Court Rule 22.6, the attention of the Court is invited to a Petition for Writ of Certiorari in the case of Pagniello v. New Jersey, Docket No. 79-1894, which raises the question as to the propriety of denial of a motion to admit an out-of-State attorney pro hac vice in a

State criminal case. The issues in the two cases are similar.

James G. Kolb, Esquire
Attorney for Petitioner
414 Hungerford Drive
Rockville, Maryland 20850
301-340-6850

PROOF OF SERVICE

I certify that copies of the foregoing were deposited in a United States Mail Box, with first-class postage prepaid, addressed to Honorable R.J. Owen, United States District Court for the Southern District of New York, Foley Square, New York, N.Y. 10007; Clerk, United States Court of Appeals, United States Court House, Foley Square, New York, N.Y. 10007; U.S. Attorneys Office, Southern District of New York, One St. Andrews Plaza, New York, N.Y. 10007; and the Solicitor General, Department of Justice, Washington, D.C. 20530 on September ____, 1980.

James G. Kolb, Esquire

SECOND SUMMER PANEL

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, one thousand nine hundred and 80.

In the Matter of Sebastian Intersimone,

Petitioner.

A motion having been made herein Petitioner pro se for A WRIT OF MANDAMUS

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied. Judge Oakes would in respect to the denial of Mr. Kolb's application for admission pro hac vice deny the application without prejudice to renew in sixty days with the suggestion that the district court hold a hearing or develop the record further.

/s/
JAMES L. OAKES

/s/
JON. O. NEWMAN

/s/
AMALYA L. KEARSE, Circuit Judge

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-2016

In the Supreme Court of the United States

OCTOBER TERM, 1980

IN RE SEBASTIAN INTERSIMONE, PETITIONER

ON MOTION FOR LEAVE TO FILE AND PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2016

IN RE SEBASTIAN INTERSIMONE, PETITIONER

ON MOTION FOR LEAVE TO FILE AND PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner requests that this Court issue a writ of mandamus to require that his counsel be permitted to represent him *pro hac vice* in connection with his filing of a motion for a new trial in the United States District Court for the Southern District of New York.

1. In November 1976, petitioner was convicted on a number of counts of a narcotics conspiracy indictment. He was sentenced to concurrent terms of 15 years' imprisonment, a $25,000 fine, and a three-year term of special parole on each count. This conviction was summarily affirmed by the court of appeals. 573 F. 2d 1298 (2d Cir. 1978).

On June 22, 1979, petitioner was convicted of contempt of court for contacting various jurors from his trial in

contravention of an order of the district court. The court sentenced him to an additional four months' imprisonment on that conviction. Again, the court of appeals summarily affirmed. 622 F. 2d 576 (2d Cir. 1980).

Petitioner then filed a motion for a new trial, in which he was for the first time represented by his present attorney, James G. Kolb, of Rockville, Maryland. After filing the new trial motion on petitioner's behalf, attorney Kolb filed a paper he styled a "Motion and Affidavit," in which he requested that he be permitted to appear *pro hac vice* as petitioner's counsel (Pet. App. 1-2). The district court, in a memorandum endorsement, denied the motion (Pet. App. 2). Kolb then wrote a letter to the court again requesting that he be permitted to represent petitioner (Pet. App. 3-4). The district court, treating the letter "as an application for reargument," denied the request (Pet. App. 4).

2. Kolb then filed a petition "for writs of mandamus and prohibition" in the court of appeals, seeking to force the district court to permit him to represent petitioner in connection with his new trial motion (Pet. App. 5-7). The court of appeals denied the petition without opinion (Pet. App. 8).

3. Petitioner asserts, without supporting argument or citation of authority (Pet. 6), that the district court's action was arbitrary and capricious and an abuse of discretion. Petitioner further contends, again without citation of authority, that the district court's action is contrary to its "mandatory duty under the Sixth Amendment to the Constitution of the United States to permit petitioner to be represented by counsel of his choice" (Pet. 6-7).

Petitioner is incorrect in suggesting that he has an absolute right under the Sixth Amendment to be represented by attorney Kolb. The Sixth Amendment guarantees a defendant the effective assistance of counsel in criminal cases, but it does not require that a court ensure that the defendant be given the particular lawyer he chooses, even at trial. See *United States ex rel. Carey* v. *Rundle*, 409 F. 2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); see also *United States* v. *Dardi*, 330 F. 2d 316, 335 (2d Cir.), cert. denied, 379 U.S. 845 (1964); *Maynard* v. *Meachum*, 545 F. 2d 273, 278 (1st Cir. 1976). Moreover, the Sixth Amendment has no role to play whatever in the present case, since the Sixth Amendment does not apply to post-conviction proceedings such as a motion for a new trial. See *United States* v. *Lee*, 513 F. 2d 423, 424 (D.C. Cir.), cert. denied, 423 U.S. 916 (1975); *Dirring* v. *United States*, 353 F. 2d 519, 520 (1st Cir. 1965); see also *Vandenades* v. *United States*, 523 F. 2d 1220 (5th Cir. 1975); *United States ex rel. Curtis* v. *Illinois*, 521 F. 2d 717, 719 (7th Cir.), cert. denied, 423 U.S. 1023 (1975); *Day* v. *United States*, 428 F. 2d 1193, 1195 (8th Cir. 1970); *Stanley* v. *Wainwright*, 406 F. 2d 8, 10 (5th Cir. 1969). Nor does a lawyer have an absolute right to appear *pro hac vice* in representing a client. *Leis* v. *Flynt*, 439 U.S. 438 (1979).

Moreover, petitioner's attorney has not satisfied the requirements of Local Rules 3(c) and 4(a) of the United States District Court for the Southern District of New York regarding *pro hac vice* applications. Rule 3(c) provides that an attorney from another state may be permitted "to argue or try a particular cause." However, it further provides that only an attorney who is a member of the bar of the district court "may enter appearances for parties, sign stipulations or receive payments upon

judgments, decrees or orders." Rule 4(a) requires that an attorney who appears as attorney of record in the district court must either have an office in the Southern or Eastern District of New York or retain as local counsel an attorney who has an office in one of those districts. Because petitioner's counsel is not a member of the bar of the district court and has not designated a member of the bar as local counsel, the district court's action cannot be characterized as arbitrary, capricious, or unreasonable.

Finally, at least at the present juncture, the district court's ruling is not prejudicial to petitioner. The motion for a new trial has already been filed and is pending before the district court. Unless the district court determines that a hearing should be held on that motion, attorney Kolb will not need to make any further appearances in district court on petitioner's behalf. Accordingly, there is no basis for granting relief at this time, particularly by means of a writ of mandamus, the relief that petitioner has requested from this Court.

It is therefore respectfully submitted that the petition for a writ of mandamus should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10